WHITE CASTLE LUMBER AND
SHINGLE COMPANY, LTD.

IBLA 76-695 Decided September 12, 1977

Appeal from decision of the Eastern States Office, Bureau of Land Management, calling for additional information for color of title applications ES-15228 and ES-15229.

Set aside and remanded.

1. Swamplands

Where a state selects land as swamp and overflowed within the meaning of the Swamplands Acts and relies on field notes which predate the Acts to establish the character of the land, those field notes must show conclusively that the land is swamp and overflowed. In analyzing such pre-Act field notes, the Department will examine all descriptive references contained in the notes, including types of terrain and vegetation and their relative location.

2. Swamplands

It is generally stated that grants of swamp and overflowed lands under the 1849 and 1850 Swampland Acts were in praesenti and gave the states inchoate title to such lands that was perfected, as of the dates of the Acts, when the lands were identified and legal title passed to the state under the procedure established by the Acts.

3. Color or Claim Title: Generally--Res Judicata--Rules of Practice: Appeals: FAilure to Appeal--Swamplands

In order for a state to receive legal title to a swampland selection, the Secretary of

> the Interior or his delegate must determine that the land is swamp in character and available for disposition under the grant. An erroneous decision that selected land is unavailable because it was sold prior to the selection is valid and binding until set aside. The erroneous decision will not be set aside where the state did not appeal and the decision has remained unchallenged for over 100 years, the state itself sold the land at a tax sale to the predecessor in interest of a color of title applicant, and an adverse right, i.e., a class 2 color of title application, has intervened.

APPEARANCES: James W. McDade, Esq., McDade and Lee, Washington, D.C., and Andrew S. Zengel, Esq., Monroe & Lemann, New Orleans, Louisiana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

White Castle Lumber and Shingle Company, Ltd., appeals from the June 16, 1976, decision of the Eastern States Office, Bureau of Land Management (BLM), requiring it to submit documentation and evidence, as outlined in 43 CFR 2625.2(b), that certain land is not swamp and overflowed within the meaning of the Act of March 2, 1849, 9 Stat. 353. The land in question, SE 1/4, sec. 18, T. 11 S., R. 12 E., L.M., containing 160.38 acres, is the subject of three pending applications at BLM: ES-10416, a selection of the land as swamp and overflowed under the Act of March 2, 1849, 9 Stat. 352, re-filed on October 28, 1975, by the State of Louisiana; ES-15228, a class 2 color of title application, filed on May 5, 1975, by appellant; and ES-15229, a class 1 color of title application, filed on May 5, 1975, by appellant.

In requiring appellant to submit the additional information, the BLM Eastern States Office has, in fact, ruled that the land is swamp and overflowed within the meaning of the Act of March 2, 1849. It has also ruled that a rejection of an 1850 selection by the State of the same land by a decision of the General Land Office in May 21, 1853, was in error and does not bar reinstatement or reconsideration of the original swamp selection. Since the decision of the Eastern States Office was rendered, a recent decision of this Board, John Stuart Hunt, 31 IBLA 304, 84 I.D.(1977), has issued which bears on the latter ruling. Appellant's contentions are primarily addressed to the request for additional information. It asserts that the BLM's determination that the land was swampland based on the field notes of the survey of T. 11 S., R. 12 E., L.M., is erroneous, that the survey notes do not show conclusively that the SE 1/4 of section 18 was swamp and overflowed, and that BLM improperly placed the burden of proof upon it rather than on the State.

Because the BLM's "Call for Additional Information" was based upon determinations, clearly adverse to appellant's interest, which establish the legal posture of the case, and because resolution of certain issues will decide this case, we are considering appellant's appeal even though the BLM decision was not a final ruling. Cf. Carl Wittman, 16 IBLA 188 (1974); Anna A. Madros, 7 IBLA 323, 79 I.D. 606 (1972).

It is necessary to set forth the factual background leading to the conflicting applications of the State and appellant to understand the problems in this case.

The township involved here was surveyed by Deputy Surveyors Downing and Connelly in the winter of 1830-31. 1/ The plat of survey was approved in April 1831. Section 1 of the township is a large, irregular entry, apparently predating the survey. As a result, the township contains only 33 sections and the location of the numbered sections is irregular. Section 18, which would normally be located on the west boundary of a regular township, is located in the middle of T. 11 S., R. 12 E., L.M., in the approximate position of section 21 in a regular township. The plat shows section 18 contains "641.52" acres.

On December 25, 1841, William B. Gibbens was issued a Certificate of Purchase in New Orleans cash entry No. 1882 by the Land Office for the SE District of Louisiana for lot 1, or fractional SE 1/4, sec. 11, T. 11, R. 12 E., L.M. On January 29, 1845, Gibbens received the patent for that land, containing "125.20" acres. This entry is recorded on page 192 of the Tract Book for T. 11 S., R. 12 E., L.M.

Congress, by the Act of March 2, 1849, 9 Stat. 352, granted to the State of Louisiana "the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation" which were "not claimed or held by individuals." 2/ In 1850, the State submitted a list of lands which it claimed under the Act of March 2,

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1/ The state selection case file, ES-10416, contains copies of pages from two different sets of field notes of the survey of T. 11 S., R. 12 E., L.M. The source of the copies is not identified. There are no crucial differences between the descriptions in the notes.

2/ The Act of March 2, 1849, granted swamp and overflowed lands only to the State of Louisiana. The Act of September 28, 1850, as amended, 43 U.S.C. § 982 et seq. (1970), granted such lands to other states. The 1850 Act is considered to be substantially a re-enactment of the 1849 Act as far as Louisiana is concerned. Burdens of proof and required showings are the same under both Acts. State of Louisiana, 10 IBLA 283, 284 (1973); State of Louisiana (On Review), 26 L.D. 5 (1898).

1849. Among the lands listed was section 18, T. 11 S., R. 12 E., L.M., containing "641.52" acres. On May 21, 1853, the Commissioner, General Land Office (predecessor of BLM), issued List No. 1A containing those lands "selected as enuring to the State of Louisiana under the Act of Congress, approved March 2nd, 1849, * * * which were sold and located prior to the passage of said Act, and are hereby rejected." Included on List No. 1A was "Lot No. 1 (or Fr SE 1/4," sec. 18, T. 11 S., R. 12 E., L.M., containing "65.20" acres. Page 194 of the Tract Book for T. 11 S., R. 12 E., L.M., shows the following transactions with regard to section 18: (a) "NE 1/4 NW 1/4 & SW 1/4," containing "516.32" acres, selected by the State of Louisiana under the Act of March 2, 1849, and approved on May 6, 1852; (b) "Lot No. 1 or Fr SE 1/4," containing "125.20" acres, sold and patented as cash entry No. 1882 to William B. Gibbens; and (c) "Lot No. 1 or Fr SE 1/4," containing "65.20" acres, selected by State of Louisiana and rejected on List No. 1A. There is nothing in the case files indicating that the State appealed the decision rejecting its selection of the SE 1/4 of section 18.

There does not appear to be any doubt that the rejection of the selection of the SE 1/4 of section 18 for the stated reason was erroneous and that legal title to the SE 1/4 was, and still is, in the United States. The documents relating to Gibbens' New Orleans cash entry No. 1882 all refer to section 11. All township plats in the case files, except the original 1831 survey plat, show cash entry No. 1882 located in section 11. The only land office document in the case files on which Gibbens' entry appears in section 18 is on page 194 of the Tract Book.

The SE 1/4 of section 18 apparently appeared in 1871 on the tax rolls at the Court House in Plaquemine, Parish of Iberville, Louisiana, according to appellant's color of title applications. Those applications state that "W. B. Gibbons" was assessed taxes on the property from 1871 to 1876. In 1877, the property was sold by the Sheriff for nonpayment of taxes during the previous 6 years. This begins appellant's direct chain of title. Appellant states that it purchased the SE 1/4 on June 7, 1902, together with a large amount of other property, from a successor in interest to the purchaser at the 1877 tax sale. It appears that appellant has made a prima facie showing at least of a class 2 color of title under the Color of Title Act, 43 U.S.C. § 1068 (1970), and implementing regulations, 43 CFR 2540.

There is no indication Louisiana took any action to reinstate its 1850 application as to the SE 1/4, until it filed an application on April 13, 1972, for confirmation of the 1850 selection of the SE 1/4 under the Act of March 3, 1857, 11 Stat. 251. That Act confirmed selections by states under the Swampland Acts (see fn. 2). On October 16, 1975, the BLM Eastern States Office held the 1972

application for rejection because the 1857 Act applied only to selections pending at that time and the State's selection of the SE 1/4 had been rejected. BLM then informed the State to request reconsideration of the 1850 selection and to provide independent evidence to establish the character of the land in 1849 because the 1831 field notes did not show the SE 1/4 of section 18 as swamp and overflowed. The State did not protest this ruling. It submitted another selection application on October 28, 1975, based upon the survey plat and field notes but filed no independent evidence. Meanwhile, the Division of Cadastral Survey wrote a memorandum dated November 6, 1975, defining "saw grass," which appears frequently in the field notes as "saw grass bottom," and stating "Vegetative species such as saw grass, cypress and gum are typically associate with a swampy environment." The memorandum strongly suggested that the field notes indicate the SE 1/4 was swampland within the meaning of the 1849 Swampland Act. A memorandum to the file dated January 20, 1976, indicates that BLM revised its analysis of the field notes to the position that the SE 1/4 may have been swamp and overflowed within the meaning of the 1849 Swampland Act. Thereafter, in June 1976, BLM issued the Call for Additional Information from appellant, stating that "An examination of the application of the State indicates that the land is swamp and overflowed as defined by the Act."

Appellant was required to comply with 43 CFR 2625.2(b) which sets out the requirements for establishing the non-swamp character of land in a claim adverse to a State swampland selection and places the burden of proof upon the claimant adverse to the State. The regulation assumes that the land was "returned as swamp." 43 CFR 2625.2(a). Appellant disputes the fact that the SE 1/4 was returned as swamp and presents a detailed analysis of the 1831 survey field notes.

We agree with appellant that the burden should not have been placed upon it in the posture of this case for several reasons.

[1] First, with respect to the showing of the survey as to the character of the land, particular problems arise when examining survey field notes which form the basis of swampland selections where the notes were written before the passage of the Swampland Acts in 1849 and 1850. Such notes obviously do not describe the land with reference to the requirements of the Acts. When considering pre-1849 field notes, Secretary of the Interior Lamar set forth the following rule in State of Louisiana, 5 L.D. 514, 520 (1887):

> [B]ut where [field notes of survey] made before the passage of that act [the 1849 Swampland Act], all the descriptive words in the grant, or words clearly of a like import, must appear; and where they do not appear,

> the State must show by other satisfactory evidence that the lands claimed are of the class contemplated by the grant.

The above rule, which has been interpreted to require a "conclusive" showing in the field notes that the land is of the character specified in the Swampland Acts, has been affirmed by the Department many times. However, where the field notes are inconclusive, i.e., the field notes do not establish the character of the land as either swamp or nonswamp, the Department has ordered hearings for the taking of relevant evidence, with the proviso that if any doubt remains as to the character of the land, the decision must be against the applicant State. E.g., State of Louisiana, A-26470 (November 10, 1952); State of Mississippi v. United States, 48 L.D. 421, 425 (1921); State of Louisiana, 32 L.D. 270 (1903); State of Michigan v. Fosdick, 26 L.D. 99 (1898); State of Arkansas, 16 L.D. 90 (1893); State of Mississippi, 13 L.D. 117 (1891).

When pre-1849 field notes are being analyzed, all reference to terrain and vegetation and their relative location should be taken into consideration. E.g., State of Louisiana, A-29124 (January 14, 1963); State of Louisiana, A-25166 (June 29, 1949); State of Louisiana, 4 L.D. 524, 525 (1885), aff'd 5 L.D. 514 (1887). The fact that some lands adjoining the land claimed were granted to the State as swampland at an earlier date has little weight next to the actual statements in the field notes. State of California, 8 IBLA 164, 171 (1972); State of Louisiana, A-27345 (Supp.) (May 14, 1958); cf. State of Louisiana, 5 L.D. 514, 519 (1887).

The record does not show that the BLM State Office adequately analyzed the 1831 survey field notes involved here. Were it necessary to consider further the character of the land, the State Office would have to weigh properly the conflicting analyses of the field notes before placing the burden of proof upon appellant. We note that appellant has submitted affidavits of two witnesses expressing their opinion that the land was not swampland in character in 1849, and additional information concerning the land. While the submission of this material tends to moot part of the requirement in the BLM decision, it does not moot the issues discussed below.

[2, 3] The next issue in this case, which may be determinative, concerns the Bureau's assumption that the State may seek reinstatement of its 1850 application and that the failure of it to take action in this matter until its applications were filed in 1972 and 1975 has no bearing upon appellant's applications.

It is generally stated that the grants of swamp and overflowed lands under the 1849 and 1850 Swampland Acts were in praesenti and gave the states inchoate title to such lands that was perfected,

as of the dates of the Acts, when the lands were identified and legal title passed to the state under the procedures established by the Acts. Work v. Louisiana, 269 U.S. 250, 255 (1925). However, as previously noted, a recent decision by this Board, John Stuart Hunt, supra, considered the effect of this Department's erroneous rejection of a Louisiana swampland selection, which action was not appealed by the state, upon a current swampland selection for the same land. The Board stated therein at 309, 84 I.D. ____:

> The cases discussed below establish that, for reasons of fairness and sound policy, a swamp land grant, although it is a grant in praesenti, must be found to be swamp in character and available for disposition under the grant before legal title passes and that the Secretary or his delegate has jurisdiction to decide the eligibility of land for the swamp land grant. Having such jurisdiction, his judgment, even though erroneous, is valid and binding until set aside. [Emphasis added.]

The basic facts in the Hunt decision are identical to the present case: (1) an erroneous rejection in 1853 of a Louisiana swampland selection; (2) failure of the State to appeal the rejection; (3) later sale of the rejected land by the State for failure to pay taxes, thus starting a chain of title; (4) a recent selection of the land by the State under the Swampland Act; and (5) a subsequent color of title application for the land based on a chain of title begun by the tax sale. In Hunt, the majority of the Board held that under such circumstances a valid class 2 color of title application is an adverse right sufficient to prevent reconsideration of the erroneous rejection of the swampland selection and to deny priority to the new swampland selection.

The only factual difference between the present case and the Hunt case concerns the rejection of the original state selection application. In Hunt the application was clearly rejected for all of the subdivision in question. Here, it is clear that the state was granted all of the lands applied for in section 18 which it sought except the entire SE 1/4; however, List No. 1A indicated it was rejecting the state's selection of "lot 1 or fractional SE 1/4 containing 65.20 acres." Thus, there is an acreage discrepancy because the SE 1/4 contains 160.38 acres rather than 65.20 acres. Actually, it should have been much easier for the State in this case than in Hunt to have caught the error because of this acreage discrepancy between its application, the acreage certified to it, and the specific acreage rejected. We believe the basis for the Hunt decision is applicable here, in the absence of any sound reason for distinguishing the case. The factual difference does not appear to warrant a different result. It is apparent the State has considered its 1850 application rejected as to the

entire SE 1/4 of section 18, and not just a portion of the subdivision. The rejection embraced the entire SE 1/4 subdivision although it described the subdivision as "fractional." The fact an erroneous lot number and acreage were also given does not change the import of the action rejecting the subdivision.

Accordingly, as in Hunt, if appellant's application is found to be valid, it is an adverse right and should be allowed, and the State's application rejected. If it is not, the State's application would be ripe for adjudication.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded for further action consistent with this opinion.

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Joan B. Thompson
Administrative Judge

We concur:

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Douglas E. Henriques
Administrative Judge

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Martin Ritvo
Administrative Judge